

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
PETITION FOR
REHEARING
EN BANC**

77-2123

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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BERNARD BERGMAN,

Petitioner-Appellant,

-against-

HONORABLE LOUIS J. LEFKOWITZ, New
York State Attorney General, the
Justices of the Supreme Court of the
State of New York, sitting in New
York County,

Respondents-Appellees.
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PETITION FOR REHEARING WITH
SUGGESTION FOR REHEARING IN BANC

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PRELIMINARY STATEMENT

Pursuant to Federal Rules of Appellate Procedure 35 and 40 the appellant moves the court for rehearing of the decision entered December 19, 1977 and respectfully suggests that the case be reheard in banc.

ARGUMENT

The panel opinion, at slip op. 743 n. 14 states:

"The State has suggested that insofar as Bergman's habeas petition depends on Hynes' press release and press conference, state remedies may not have been exhausted since the Appellate Division refused to consider extra-record material. However, both parties prefer that we decide the entire case and we shall do so. To require further state proceedings 'might well invite the reproach that it is the prisoner rather than the state remedy that is being exhausted.' United States ex rel. Kling v. LaVallee, 306 F. 2d 199, 203 (2 Cir. 1962) (concurring opinion). We therefore exercise our discretion not

to require these. Cf. Frisbie v. Collins, 342 U.S. 519 (1952); United States ex rel. Graham v. Mancusi, 457 F. 2d 463, 468 (2d Cir. 1972); United States ex rel. Ellington v. Conboy, 459 F. 2d 76, 79 (2d Cir. 1972)."

The panel was thus under the impression that it was deciding "the entire case" at the request of both parties. But, that impression was erroneous, as the record plainly demonstrates. The respondents have -- from the outset of this litigation -- vigorously opposed any decision by the federal courts on the significant double jeopardy issue raised by appellant. The District Court expressly declined to rule on that issue, holding that it had not been presented to the state courts. The District Court concluded:

"While adjudication of these claims does not intrude upon the prerogatives of the state courts, consideration of the double jeopardy claim would. Picard v. Connor, 404 U.S. 270 (1971); Gates v. Henderson, No. 76-2065 (2d Cir., decided Aug. 19, 1977); Fielding v. LeFevre, 548 F. 2d 1101 (2d Cir. 1977). That claim was not briefed or argued in state court, and it is raised tersely, almost as an after-thought, in this proceeding. Consequently, the Court declines to reach the claim of a violation of the Double Jeopardy Clause."

The appellant did not brief that issue on the appeal to this Court, intending instead to expand the double jeopardy claim in the state courts. The decision of the panel of the Court states, however, that it has decided "the entire case."

Accordingly, appellant respectfully petitions this Court either to consider and decide the novel and important double jeopardy issue raised in this case, or, at the very least, to amend its opinion

so as to make it clear that it has not decided the double jeopardy issue. The panel recognized that "to require further state proceedings 'might well invite the reproach that it is the prisoner rather than the state remedy that is being exhausted.'" Slip op. at 743, n. 14. Accordingly, appellant respectfully requests the court to consider and decide the double jeopardy issue either on the basis of the following outline of an argument and the respondents' reply brief or with the additional assistance of further briefing or oral argument.

All of the facts necessary to establish a violation of double jeopardy appear in the court records.

The record of this case plainly establishes that the federal judge's imposition of the four month sentence constituted a joint punishment for both the federal and state crimes to which appellant pleaded guilty. In imposing this sentence, the federal judge repeatedly stated in the presence of the state prosecutor and without any objection from him that "as part of the detailed plea agreements it is expected that the prison sentence imposed by this Court will comprise the total covering the state as well as the federal convictions." United States v. Bergman, 416 F. Supp. 496, 498 (emphasis added). The federal judge expressly proceeded to impose the sentence he did "on the assumption that the sentence

imposed by this Court. . .will be the only sentence for the state and federal pleas." Tr. June 16, 1976 at p. 41 (emphasis added).

It is clear therefore that the petitioner was sentenced and punished for his state crime by the federal judge. This was done with the formal agreement of the state prosecutor, the federal prosecutor, and the petitioner. The state procecutor, after having "agreed to have the problems of sentencing handled by the federal court,"* is estopped from now claiming that the federal sentence did not constitute punishment for the state crime. The record of this case establishes, therefore, that -- as a matter of federal constitutional law -- the petitioner was punished by the federal judge with the consent of the state prosecutor for the state crime for which he had pleaded guilty in the state court.

The double jeopardy clause thus forbids the imposition of any additional punishment by the state courts for the state crime for which petitioner was already punished by the federal judge.

*413 F. Supp. 496, 498. This agreement is also reflected in the written letter which provides, inter alia, that the state prosecutor "will make a submission of facts to the federal judge and the Probation Department" before the imposition of the sentence by the federal judge. App. at A. 60.

The opinion of the panel implicitly rejected several critical findings of fact made by the District Court favorable to the appellant which were not clearly erroneous. Among those findings of fact were the following:

1. The panel found that "the [Special Prosecutor's] press statement makes no reference at all to the forthcoming state sentence." Slip op. at 744. The District Court found "Hynes' words clearly reflected on the impending state sentence since he was committed to recommending the same sentence." App. at A. 33. This finding is crucial, especially in light of the panel's conclusion that:

"...It is not unreasonable to read into the argument an implied term that the Special Prosecutor would not comment on the federal sentence in a manner that would constitute a reneging on his obligation to recommend that the state judge impose no additional sentence or make it practically impossible for the state judge to accept such a recommendation." Slip op. 744.

If, indeed, the press statement did refer to the forthcoming federal sentence -- as Judge Goettel found it did -- then the plea bargain was breached by the prosecutor.

2. The panel stated that "admittedly Hynes made the recommendation he had promised to make." Slip op. at 745; emphasis added. Not only has this never been admitted by the appellant; the District Court expressly found to the contrary "it [the sentence recommendation] did not literally comply with the plea agreement, in that [the Special Prosecutor] made no reference to the voluntary disclosures made by Bergman with a knowledge of the federal judge of such disclosures." App. at A. 25.

Accordingly, appellant respectfully requests this Court to reconsider the opinion of the panel on the basis of the facts found by the District Court and not found to be erroneous by the panel.

As appellant's brief before the panel demonstrated, and as the District Court acknowledged, this is an important, complex and difficult case raising novel issues concerning a unique tripartite plea bargain and its consequences in light of Santobello v. New York, 404 U.S. 257 (1971). For that reason and the reasoning of the District Court, which found an apparent conflict between two prior decisions of this Court [United States v. Podell, 519 F. 2d 144 (2d Cir.), cert denied, 423 U.S. 926 (1975) and Palermo v. Warden, Green Haven State Prison, 545 F. 2d 286 (2d Cir. 1976)], the court should consider whether a rehearing in banc is appropriate.

CONCLUSION

THE PETITION FOR REHEARING SHOULD BE GRANTED BY THE PANEL OR THE CASE SHOULD BE HEARD BEFORE THE COURT IN BANC; ON SUCH REHEARING THE ORDER OF THE UNITED STATES DISTRICT FOR THE SOUTHERN DISTRICT OF NEW YORK SHOULD BE REVERSED WITH DIRECTIONS THAT THE WRIT OF HABEAS CORPUS ISSUE.

Respectfully submitted,

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Rec'd
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12/30/77

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